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Supreme Court of the United States

OCTOBER TERM, 1984

GRANT V. RODKEY, M.D., HENRY BROWN, M.D., AND THE MASSACHUSETTS MEDICAL SOCIETY,
PETITIONERS,

v.

BLUE SHIELD OF MASSACHUSETTS, INC.,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Reply Brief in Support of Petition

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Introduction

Respondent Blue Shield's Brief in Opposition (hereafter "Br. Opp.") concedes the critical fact that Blue Shield possesses such dominant market power that Massachusetts physicians are economically coerced to accept whatever prices Blue Shield imposes on them. (Br. Opp. 13-14).[1] Fur-

[1] Blue Shield attempts to avoid the legal implications of that concession by relying on the First Circuit's questionable view that a monopolist is free to exploit its market power to effect maximum

thermore, Blue Shield admits that the cases principally relied upon by the First Circuit[2] are distinguishable from the instant case, on the fundamental basis that in those cases (as well as in the other authorities cited by the First Circuit for the proposition that Blue Shield is a "purchaser") there was no evidence whatsoever that the pricing restrictions had any adverse impact on competition beyond the mere restriction on provider reimbursement by the insurer. (Br. Opp. 13-14 and nn. 7-8).[3] This is in stark contrast to the voluminous evi-

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price restraints. (Br. Opp. 14). That position is contrary not only to this Court's admonitions against resale and maximum price fixing (Petition, 17-18, 20-23), but also to the Court's many pronouncements that one who possesses a special license or privilege or lawful monopoly is not warranted in extending it beyond its legitimate scope by imposing additional or unrelated restraints in order to gain competitive advantage, as Blue Shield aggressively did here in perpetuating and extending its vicious circle of dominance in both the physicians' services and the private health insurance markets. (Petition, 8-10). *E.g., Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100 (1969); *United States v. Line Material Co.*, 333 U.S. 287 (1948); *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942). The First Circuit misused its only supporting judicial authority for this position, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), since it ignored the *Berkey* court's sensitivity to the significance of a monopolist's abuse of monopoly power through any "conduct directed at smothering competition" or "wield[ing] the . . . power to tighten its hold on the market" (603 F.2d at 275), exactly the type of conduct charged and found in the present case. (Petition, A.66).

[2] *Sausalito Pharmacy, Inc. v. Blue Shield of California*, 677 F.2d 47 (9th Cir. 1982) (*per curiam*) (affirming 544 F.Supp. 230 (N.D. Cal. 1981)), *cert. denied*, 459 U.S. 1016 (1982); *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc.*, 675 F.2d 502 (2d Cir. 1982) (*per curiam*) (affirming 518 F.Supp. 1100 (D. Conn. 1981).

[3] Indeed, in *Medical Arts*, the Second Circuit plainly indicated its view that monopoly power in one market should not be allowed to be leveraged so as to gain monopsony power in another market, in noting that the provider plaintiffs there (unlike petitioners here) had not claimed, let alone proved, that Blue Cross-Blue Shield had

dence of the sweeping scope and substantiality of the pricing restraints' effects in this record. (Petition, A.53, A.59-A.65, A.67).[4] Consequently, the only new matters requiring a reply are Blue Shield's suggestion that the case is moot because of a subsequent state statute purporting to prohibit balance billing, and a number of important factual misstatements by Blue Shield.

Argument

I. THE MASSACHUSETTS STATUTE RELIED ON BY BLUE SHIELD DOES NOT IMMUNIZE ITS PRICING RESTRAINTS FROM ANTITRUST SCRUTINY, NOR MOOT THIS CASE.

A. *C. 192 Does not Satisfy the Requirements for State Action Immunity.*

Blue Shield's argument, that Mass. St. 1984, c. 192, § 1 has provided its pricing restraints with "state action" immunity

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"monopsony power with which it might be capable of obtaining agreements with anticompetitive effect." 675 F.2d at 507.

[4] By Blue Shield's own record admissions, Blue Shield's maximum price limitations, enforced by the ban on balance billing, directly restrain the pricing freedom of 99% of all practicing physicians in Massachusetts (or over 14,000 physicians). The ban is an integral part of the contracts covering some 2,700,000 people in Massachusetts, or over 47% of the entire state population. The contracts which include the ban yield Blue Shield over $1,000,000,000 in premium income each year. The ban is imposed on Massachusetts physicians' billings (submitted charges) totalling at least $269,000,000 per year, produces an average "discount" of 30% below actual charges, and causes a maximum potential dollar loss to Massachusetts physicians of about $80-100,000,000 per year. By any reasonable standard, these are quantitatively substantial impacts which are above and beyond the deleterious impact on medical service quality and innovation which were also found by the District Court to result from the restraints. (A.60-67). Particularly since the ban substantially forecloses price competition for about half the population of the entire state with respect to over half of the private health insurance business in the state, the anticompetitive impact, above and beyond the limitation on physicians' reimbursement, is manifestly appreciable, significant and unreasonable. (Ex. 635-638, 1051, 1519-1523, 1526-1527, 1540-1672, 2256, 2376; Tr. 26, 625, 877, 993-994, 1150).

and consequently renders this case moot (Br. Opp. 2, 8, 9, 17-18), was plainly rejected by the First Circuit in passing on the merits (Petition, A.5), since mootness would have destroyed justiciability of the suit under Article III. *See* 13A Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* §§ 3533 *ff.*

From the earliest stages of this litigation Blue Shield has sought to shield its pricing restraints behind the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny. That defense was decisively rejected by both the Massachusetts Supreme Judicial Court (Br. Opp. 10a-15a) and the District Court (*id.*, 24a-26a) applying this Court's recent rulings. Subsequent to the District Court's decision that Blue Shield's restraints violated Section 1 of the Sherman Act, Mass. St. 1984, c. 192, § 1 was enacted, purporting to prohibit balance billing by Blue Shield participating physicians (*id.*, 38a-39a), which Blue Shield now claims immunizes its restraints from antitrust scrutiny.

In fact, this legislation does not satisfy either of the two requirements for state action immunity laid down by this Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) ("*Midcal*"). First, c. 192 does not mandate a pricing restraint that is "clearly articulated and affirmatively expressed as state policy". It not only allows Blue Shield to continue to have as many insurance plans (so-called Plan B) which permit balance billing as it wishes (subsection (b)) (see Petition, A.36, Br. Opp. 8a, App. 81-83, 111-114); but it also allows Blue Shield to enter into as many group contracts allowing balance billing as it wishes (subsection (c)). Accordingly, the legislation has created a gossamer facade, prohibiting balance billing except to the extent Blue Shield or its employer-group subscribers determine it is in their business interest to allow it. "A State that allows . . . [non-State entities] to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions"

that they choose to impose. *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 55 (1982).

Chapter 192 also fails to satisfy the second leg of the state action doctrine, in that it does nothing to remedy the lack of "active state supervision" required by *Midcal*. Both the Massachusetts Supreme Judicial Court and the District Court explicitly held that the Commissioner of Insurance did not possess the requisite active supervisory power over Blue Shield's pricing restraints to accord state action immunity (Br. Opp. 14a, 26a), and c. 192 does not give the Commissioner any new or additional regulatory authority with respect to the amounts of the maximum charges to be allowed for physicians' services.[5] Chapter 192 is nothing more than what this Court found insufficient in *Midcal*: The legislative blessing of a private price-fixing scheme in which "[t]he State neither establishes prices nor reviews the reasonableness of the price schedules.... The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." 445 U.S. at 105-106.[6]

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[5] Indeed, by simply prohibiting the charging of "any amount in excess of the amount of compensation *determined and allowed by a medical service corporation* [*i.e.*, Blue Shield]," c. 192 confirms the basic fact of this case, that maximum physician fees are fixed by a private party, Blue Shield, and not the state. As petitioners have already shown (Petition, 23 n.12), the state has no power to set physicians' fees in Massachusetts and does not review, nor is even advised of, the amounts Blue Shield pays for particular services or kinds of services or to particular physicians. (App. 102-103).

[6] Even if c. 192 had created a state action immunity for Blue Shield's pricing restraints, it would be a nullity under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a), which preempts all state laws that impinge directly or indirectly on employee benefit plans. *E.g.*, *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *Shaw v. Delta Airlines*, ___ U.S. ___, 103 S.Ct. 2890 (1983).

B. *C. 192 Does not Render Moot the Petitioners' Claims for Relief Against the Ban on Balance Billing.*

Even assuming that the Massachusetts Legislature had succeeded in creating state action immunity for the ban on balance billing, the pending petitions would not be moot because of the existence of an action for damages against Blue Shield based upon the same facts and legal claims, in which the petitioners herein are also plaintiffs. (Br. Opp. 3 n. 2). This Court has made it clear that even when prospective injunctive relief may be moot, where the "collateral effects of a dispute remain and continue to affect the relationship of litigants, the case is not moot." *Firefighters Local Union No. 1784 v. Stotts*, ___ U.S. ___, 104 S.Ct. 2576, 2591 (1984) (O'Connor, J. concurring). *See also Boston Firefighters Union Local, 718 v. Boston Chapter, N.A.A.C.P., Inc.*, ___ U.S. ___, 104 S.Ct. 3576 (1984).

II. RESPONDENT HAS MISSTATED IMPORTANT FACTS.

A. In a transparent effort to alarm the Court, Blue Shield has stated that if the ban on balance billing were eliminated, Blue Shield or its subscribers would become liable for over $100 million per year in additional payments. (Br. Opp. 7, 9). This contention is contrary to the record evidence, as was emphasized by the District Court in warning Blue Shield's President in open court not to repeat the false charge. (Ex. 2514-2515). Moreover, it is belied by the historical facts. Prior to 1968, participating physicians could legally balance bill approximately 60% of all Blue Shield subscribers for the difference between their usual fee and Blue Shield's payment, if lower. Yet, the undisputed evidence indicated that, as to these patients, 90% of all physicians accepted the Blue Shield fee as payment in full. (App. 82-84).[7] Finally, Blue Shield ad-

[7] This is not the only evidence in the record as to the propensity of participating physicians to balance bill. Although up until Oc-

mitted in pretrial discovery that removing the ban on balance billing would increase annual physician payments at most only an average of 2-3% (or about $6-8 million annually) (Ex. 1852, 2123), and the District Court found that the total cost to the public would not substantially change. (Petition, A.63).

B. In an attempt to minimize the impact of its price restraints, Blue Shield asserts that "only about 14 percent of total physicians' revenues in Massachusetts" are subject to the ban on balance billing. (Br. Opp. 9). This seriously misstates the District Court's findings that it is economically necessary for physicians to participate in Blue Shield. The District Court found that well in excess of 20% of total physician income was dependent upon Blue Shield participation, giving it "enormous leverage" over physicians. (Petition, A.55). This finding was supported by the testimony at trial, which indicated that as much as 60% or more of total physician practice income in Massachusetts is contingent on being a Blue Shield participating physician. (Tr. 614-623; Ex. 1524, 1870-1871).

C. Blue Shield attempts to wrap an illusory public service mantle around its restraints by claiming its statutory purpose is to "furnish medical services at low cost to members of the public." (Br. Opp. 6). Contrary to its claim, Blue Shield has no statutory obligation to furnish medical services at low cost to *all* members of the public by means of first dollar coverage service benefits. The Supreme Judicial Court of Massachusetts has definitively held that Blue Shield was created for the limited purpose of providing a means whereby *persons of*

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tober 1984 physicians who treat Medicare patients were free to balance bill the patients if they were dissatisfied with the Medicare payment, at least 80% of all services to Medicare patients by Massachusetts physicians were on an "assignment of benefits" basis, meaning that the physician accepted Medicare's reimbursement as payment in full and voluntarily forwent the right to balance bill. (Ex. 2120-2122; Tr. 823-826, 640). This further indicates the conservative nature of Massachusetts physicians' charging behavior.

average and low income could receive otherwise unobtainable medical care. (Br. Opp. 12a-15a).

D. Blue Shield discusses at length the cases describing various insurer-provider agreements as mere arrangements for the purchase of goods and services (Br. Opp. 10-17) without once coming to grips with the quite different and undisputed facts of record in this case, which demonstrate that Blue Shield is clearly *not* a purchaser of physicians' services. Petition, 14-15 and n. 4. A supposedly favorable body of law is quite irrelevant if it is not applicable to the facts of the case.

Conclusion

This case presents the Court with an historic opportunity of national significance: To determine whether our medical reimbursement system is to be governed by competition and free market forces, as petitioners advocate; or whether it will be subject to a private price control system, privately imposed for the benefit of private health insurers, which substantially eliminates price competition among physicians, inhibits quality and innovation, fuels health care cost inflation, and entrenches what the First Circuit itself previously characterized as the "pervasive and powerful force [which respondent has become] in the Massachusetts health insurance industry." *Kartell v. Blue Shield of Mass., Inc.*, 592 F.2d 1191, 1192-93 (1st Cir. 1979). Accordingly, this Court should grant certiorari to review the important questions raised.

Respectfully submitted,

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